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*Published in:*  
Ocean yearbook

*DOI:*  
[10.1163/9789004395633\\_005](https://doi.org/10.1163/9789004395633_005)

Published: 01.01.2019

*Document Version*  
Version created as part of publication process; publisher's layout; not normally made publicly available

*Citation for pulished version (APA):*  
Chircop, A., Koivurova, T., & Singh, K. (2019). Is There a Relationship between UNDRIP and UNCLOS? *Ocean yearbook*, 33, 90-130. [https://doi.org/10.1163/9789004395633\\_005](https://doi.org/10.1163/9789004395633_005)

## **Is There a Relationship between UNDRIP and UNCLOS?**

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Acknowledgement: The authors acknowledge the project Indeterminate and Changing Environments: Law, the Anthropocene, and the World (ICE LAW Project: <https://icelawproject.org/>), supported by a generous Leverhulme Trust Network Grant, in bringing them together to work on this article.

## **INTRODUCTION**

Climate change induced sea-ice melting and the consequent opening of sea routes in the Arctic have increased the chances of interaction between shipping or resource development activities and traditional uses of sea (and sea-ice) by indigenous peoples in the Arctic.<sup>1</sup> In the Pacific, climate change coupled with resource development activities is adversely impacting indigenous peoples' relationship with the ocean on which they have depended for millennia.<sup>2</sup> Bearing

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<sup>1</sup> See the Arctic Marine Shipping Assessment 2009 Report (AMSA), PAME, Arctic Council, especially the chapter on Human Dimensions, available online: < <https://oaarchive.arctic-council.org/handle/11374/54>>.

<sup>2</sup> See "Study on the relationship between indigenous peoples and the Pacific Ocean," Note by the Secretariat, Permanent Forum on Indigenous Issues, United Nations Economic and Social Council E/C.19/2016/3, dated 19<sup>th</sup> February 2016, available online: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=E/C.19/2016/3&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=E/C.19/2016/3&referer=/english/&Lang=E)>.

in mind the close ties that indigenous peoples have with the ocean, and also the emergence of a new field of law relating to the rights of indigenous peoples, in this article we will explore the possible convergence between international indigenous rights law and the law of the sea, most especially through their flagship instruments, respectively, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>3</sup> adopted by the United Nations General Assembly (UNGA) in 2007 and the United Nations Convention on the Law of the Sea, 1982 (UNCLOS).<sup>4</sup> The enquiry will be a theoretical one and the general reader might question the basis for it given the different subject-matter and status of the two instruments: UNDRIP is a UN General Assembly resolution in the field of international human rights law, whereas UNCLOS is an international multilateral convention governing the world's oceans. At the outset we recognize that as a think-piece, this article does not address all the possible issues arising from such a novel relationship and that further scholarly research will be necessary.

UNDRIP recognizes urgent needs that include respect and promotion of the inherent rights of indigenous peoples, especially their rights to self-determination, and rights affirmed in treaties, agreements and other arrangements with States, control of their lands, territories and resources, and respect for indigenous knowledge, cultures and traditional practices which contribute to sustainable and equitable development and proper management of the environment.<sup>5</sup> In some situations, the agreements between indigenous peoples and States are “matters of international concern, interest, responsibility and character.” Similar to the

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<sup>3</sup> United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295, UN Doc. A/RES/61/295, adopted 13th September 2007 (hereafter cited as UNDRIP), available online: <[http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)>. For an authoritative commentary, see Jessie Hohmann and Marc Weller, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford Commentaries on International Law (Oxford University Press, 2018) (hereafter cited as "UNDRIP Commentary").

<sup>4</sup> United Nations Convention on the Law of the Sea, adopted 10 December 1982 (entered into force 16 November 1994), 1833 UNTS 397 (hereafter cited as UNCLOS).

<sup>5</sup> UNDRIP, n. 3 above, preamble.

Universal Declaration on Human Rights,<sup>6</sup> UNDRIP sets out its provisions as a “standard of achievement.”<sup>7</sup> UNDRIP provides that “[T]he United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”<sup>8</sup> The scope of the instrument is lands, territories, waters and coastal seas and the provisions include matters such as resource rights and environment protection.<sup>9</sup>

The UNDRIP scope appears to overlap with the spatial and functional concerns of UNCLOS. The mission of UNCLOS was to settle “all issues relating to the law of the sea and ... be an important contribution to the maintenance of peace, justice and progress for all peoples of the world” (emphasis added), that “the problems of ocean space are closely interrelated and need to be considered as a whole,” and that it was desirable to establish a legal order “which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.”<sup>10</sup> The negotiators of UNCLOS believed that “the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole” (emphasis added).<sup>11</sup> Further, that the “codification and progressive development of the law of the sea achieved in the Convention ... will

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<sup>6</sup> Universal Declaration on Human Rights, UNGA Res 217 A, UN Doc. A/RES/3/217A, adopted 10 December 1948 (hereafter cited as Universal Declaration), preamble.

<sup>7</sup> UNDRIP, n. 3 above, preamble.

<sup>8</sup> Id, art 42.

<sup>9</sup> Id, arts 25-28 & 32 provide for land and resource rights. Article 29 deals specifically with environmental protection.

<sup>10</sup> UNCLOS, n. 4 above, preamble.

<sup>11</sup> Id.

promote the economic and social advancement of all peoples of the world ...” (emphasis added).<sup>12</sup>

The two instruments resulted from prolonged multilateral conference diplomacy characterized by difficult negotiation processes, both leading to final voting on their adoption despite extensive efforts towards consensus-building. Eventually both instruments secured overwhelming international acceptance. Both instruments play vital roles in international law by setting out frameworks and nourishing the larger legal system with respect to the issues they address. We do not assume that being part of the common legal edifice alone is sufficient to conclude that there must be a relationship between the two, for after all international law addresses a wide range of diverse and not necessarily always related subjects. Rather, we posit that if the two instruments address potentially common subject-matter within the purview of each other’s scope, it is worth enquiring if there is interaction and what that might be. At times, regimes in international law have been developed in silos and giving rise to potential policy and normative conflicts.<sup>13</sup> Thus it is useful to explore whether the two instruments expressly or implicitly anticipate relationships to other instruments and norms of international law.<sup>14</sup>

Hence our query and consequential consideration of whether UNDRIP could supplement or assist the interpretation of the individual and collective obligations of State Parties in implementing UNCLOS where ocean space and indigenous

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<sup>12</sup> Id.

<sup>13</sup> One such example is the separate development of the Paris Climate Agreement and World Trade Organization Rules, aspects of which potentially conflict. See J. Bacchus, *The Case for a WTO Climate Waiver*, CIGI Special Report (CIGI, 2017), available online: <<https://www.cigionline.org/sites/default/files/documents/NEWEST%20Climate%20Waiver%20-%20Bacchus.pdf>>. See also World Economic Forum, *From Collision to Vision: Climate Change and World Trade*, Discussion Paper Circulated by the Ad Hoc Working Group on Trade and Climate Change (November 2010), available online: <[http://www.felixpena.com.ar/contenido/negociaciones/anexos/2010-12-WEF\\_ClimateChange\\_WorldTradeDiscussionPaper\\_2010.pdf](http://www.felixpena.com.ar/contenido/negociaciones/anexos/2010-12-WEF_ClimateChange_WorldTradeDiscussionPaper_2010.pdf)>.

<sup>14</sup> In fact, UNDRIP has been compared to other norms of international law, such as International Investment Law. See Christina Binder, “Interactions with International Investment Law” in UNDRIP Commentary n.3 above at 87-111.

rights potentially intertwine in a contemporary setting. We will first examine the legal status of UNDRIP and UNCLOS in international law and then proceed to analyse specific provisions that concern potentially related content to explore the interface between the two instruments before concluding with an assessment on the potential relationship and its consequences. While it would be valuable to go into domestic legislation and case law, exploration of domestic practices is outside the scope of this analysis. It is hoped that this reflective scholarly enquiry generates further discussion on the novel yet essential question on the interlinkages in public international law.

## **THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES**

### **Development of UNDRIP in view of the evolution of indigenous rights**

Considering the generally slow pace at which international law evolves, indigenous peoples have achieved a great deal in a relatively short period of time. The modern international indigenous peoples' movement did not fully begin until the end of the 1970s and the first efforts to advance their rights within the UN were undertaken from 1982 onwards under the UN Working Group on Indigenous Populations (WGIP). In 1989, the International Labour Organization (ILO) replaced its largely assimilationist 1957 convention with the ILO C-169 - Convention on Indigenous and Tribal Peoples in Independent Countries (ILO 169),<sup>15</sup> which fleshed out a wide variety of legal rights for indigenous peoples. As the UN worked on adopting the Declaration on the Rights of Indigenous Peoples, the Organization of American States (OAS) began drawing up a similar

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<sup>15</sup> ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989 (entered into force 5 September 1991), 28 ILM (1989) (hereafter cited as ILO 169 Convention), at 1382.

declaration for American indigenous peoples,<sup>16</sup> and the Nordic States started to work on a Nordic Saami Convention.<sup>17</sup> This normative activity manifested itself in the work of some UN human rights treaty monitoring bodies, in particular the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination.<sup>18</sup> These bodies started to interpret their respective conventions vis-à-vis indigenous peoples in line with developments of a distinct body of law for indigenous peoples.<sup>19</sup> Notably, environmental protection treaties set up exceptions in their provisions recognising the right of indigenous communities to act according to their cultural traditions.<sup>20</sup>

The work that eventually became the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) began in 1985 within the WGIP, which consisted of five expert members and which from the beginning allowed indigenous

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<sup>16</sup> American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016 at the third plenary session of the OAS's General Assembly, available online: <<https://www.oas.org/en/sare/documents/DecAmIND.pdf>>. The declaration was negotiated from 1999 to 2016.

<sup>17</sup> Nordic Saami Convention, adopted 13 January 2017 (not yet in force), available online <<https://www.sametinget.se/105173>>. The draft Convention was submitted to the three governments as early as 2005, and the finalized text was accepted in June 2017. It is still unclear whether the Saami parliaments and the governments will move forward with the convention.

<sup>18</sup> Examples of other conventions that incorporated indigenous peoples' rights are: Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990), GA res. 44/25, 1577 UNTS 3, available at <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>, especially art 30; Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted 20 October 2005 (entered into force 18 March 2007), 2440 UNTS (hereafter cited as CPPDCE), art 7(1)(a), available online: <<http://unesdoc.unesco.org/images/0022/002253/225383E.pdf>>.

<sup>19</sup> "It is through the evolutionary interpretation of human rights treaty provisions, to the extent of expanding their inherent individual character to covering 'collective' prerogatives, that international human rights bodies have universalized indigenous peoples' rights," notes the International Law Association, Hague Conference (2010), Interim Report on a Commentary on the Declaration of the Rights of Indigenous Peoples (hereafter cited as ILA Interim Report), at 44, available online: <<http://www.ila-hq.org/index.php/committees>>.

<sup>20</sup> For example, Interim Convention on the Conservation of North Pacific Fur Seals, adopted 9 February 1957 (entered into force 14 October 1957), 314 UNTS 105 (1957), art VII; Agreement on the Conservation of Polar Bears, adopted 15 November 1973 (entered into force 26 May 1976), 13 ILM 13 (1973), art III(1)(d), available online: <<http://pbsg.npolar.no/en/agreements/agreement1973.html>>; Convention on the Conservation of Migratory Species of Wild Animals (1979), adopted 23 June 1979 (entered into force 1 November 1983), 1651 UNTS 217, art III(5)(c), available online: <<https://www.cms.int/>>; Convention on Biological Diversity, adopted 5 June 1992 (entered into force 29 December 1993), 1760 UNTS 79 (hereafter, CBD) art 8(j). Aboriginal subsistence whaling was exempted from the prohibition on whaling imposed by the International Whaling Commission established by the International Convention for the Regulation of Whaling, adopted 2 December 1946 (entered into force 10 November 1948), 161 UNTS 72, available online: <<https://iwc.int/convention>>. Also see the European Union Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, Official Journal of the European Union, L 286 of 31 October 2009.

peoples broad access to the process, irrespective of whether they had gained indigenous status with ECOSOC.<sup>21</sup> For almost a decade, the WGIP devoted a large part of its time to drafting the text of what was to become the UN Declaration in a process involving representatives of indigenous peoples, government delegations and experts on the subject. This was a large area of work, since the Declaration aimed to cover all individual and collective rights of indigenous peoples in all possible areas of their lives, from their self-determination to their right to environment, or from their free prior and informed consent over the proposed natural resource exploitation to their labour rights. The Declaration aims to protect indigenous peoples' distinct cultures, their ownership and use rights to their ancestral lands and waters, the protection of their environments and their cultural heritage. In the following, the development of the UN Declaration is examined especially in view of its provisions on self-determination, given that these were a major bone of contention between States and indigenous peoples and eventually delayed also the adoption of the UNDRIP.

In 1994, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights) adopted the Draft Declaration prepared by the WGIP and sent it to its parent body, the Commission on Human Rights (now replaced by the Human Rights Council), for consideration.<sup>22</sup> The article on self-determination at this stage drew heavily on Article 1(1) of the common Article to

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<sup>21</sup> In 1982 the Working Group on Indigenous Populations was established as a subsidiary organ to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights), endorsed by ECOSOC on 7 May 1982; UN Doc. E/Res/1982/34. It is comprised of five members of the Sub-Commission, one representing each of the five geographical regions designated by the UN for electoral purposes. As a subsidiary organ of the Sub-Commission, the Working Group is located at the lowest level of the hierarchy of UN human rights bodies. Its recommendations have to be considered and accepted first by its superior body, the Sub-Commission, then by the Commission on Human Rights (now the Human Rights Council) and the Economic and Social Council (ECOSOC) before being submitted to the General Assembly.

<sup>22</sup> Draft United Nations Declaration on the Rights of Indigenous Peoples, 1994/45, available online: <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En)>.



the Covenants in stating that “[I]ndigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>23</sup>

Another important provision of the 1994 Draft for the future framing of the right to self-determination of indigenous peoples was Article 31, which set out a right to autonomy:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.<sup>24</sup>

In 1995, the Commission on Human Rights considered the text submitted by the Sub-Commission and decided to establish an inter-sessional Working Group<sup>25</sup> with a mandate to consider the text presented and to draw up a draft declaration for the consideration by the Commission and eventual adoption by the UN General Assembly as part of the International Decade of the World’s Indigenous People (1995-2004), a goal that was never achieved. The inter-sessional Working Group consisted only of State representatives, although indigenous peoples were given access to the process by being accorded the status

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<sup>23</sup> E/CN.4/Sub.2/1993/29/Annex I, 23 August 1993, art 3.

<sup>24</sup> Id, art 31.

<sup>25</sup> Resolution of the Commission on Human Rights 1995/32, 3 March 1995.

of observers. In practice, this enabled direct negotiations between indigenous peoples and state representatives.<sup>26</sup>

Even though progress was slow in the Working Group and the goal of having the UN General Assembly adopt the UN Declaration by the end of 2004 was never achieved, in June 2006 the newly created UN Human Rights Council adopted the Declaration (although not without opposition (30 votes in favour, 2 against, 12 abstentions)),<sup>27</sup> recommending that the UN General Assembly adopt it. The Declaration had the following formulations of the right to self-determination, which later proved difficult for States to accept:

### Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

### Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

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<sup>26</sup> During the negotiations, the UN consolidated its institutional machinery for advancing the rights of indigenous peoples and in making sure that these were supervised and implemented. During the beginning of this century, the UN established the UN Special Rapporteur on Indigenous Peoples, Expert Mechanism on Indigenous Peoples and, in particular, the Permanent Forum on Indigenous Issues. C. E. Foster, "Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples," *European Journal of International Law* 12, no. 1 (2001): 141–57. See also S. Errico, "The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview," *Human Rights Law Review* 7, no. 4 (2007): 741–755. G. Pentassuglia, "The EU and the Protection of Minorities: The Case of Eastern Europe", *European Journal of International Law* vol 12 (2001): 141–157.

<sup>27</sup> See the version adopted by the Human Rights Council, (A/HRC/1/L.10, 30 June 2006, 56-72. See the explanatory paper by Canada after voting against the Declaration, which also outlines the reasons for abstention by other countries, many of them having problems with Article 3 on self-determination. Canada's Position: United Nations Draft Declaration on the Rights of Indigenous Peoples, 29 June 2006), available online: <[http://www.ainc-inac.gc.ca/nr/spch/unp/06/ddr\\_e.html](http://www.ainc-inac.gc.ca/nr/spch/unp/06/ddr_e.html)>.

Even though the original 1994 Draft and the 2006 Draft adopted by the Human Rights Council are identical in framing the right to self-determination of indigenous peoples, it is noteworthy that what had been Article 31, dealing with autonomy and self-government, had become Article 4. It was now possible to read Article 3, on self-determination, and Article 4 – the two key provisions – together.<sup>28</sup>

Even with the relocation of Article 31, the process of adopting the UN Declaration came to a halt when a non-action resolution by the Namibian Delegation was supported by the majority in the Third Committee of the UN General Assembly.<sup>29</sup> One clear reason for this was precisely Article 3, which was still there stating that indigenous peoples have a right to freely determine their political status. It is not difficult to imagine that adopting such a text would have been troublesome for anyone in the Third Committee, especially those representing the African countries.<sup>30</sup>

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<sup>28</sup> It can be argued that art 4 specifies that indigenous peoples' right to self-determination is limited to the "right to autonomy or self-government", which is often called the right to internal self-determination, that is, self-determination within the confines of existing states. This interpretation is made even more pertinent when we compare the way the right to autonomy and self-government are worded in arts 31 and 4: the former saw it "as a specific form of exercising their right to self-determination", the latter "in exercising their right to self-determination". The first formulation, if read in the context of art 3, seems to indicate that autonomy and self-government are possible ways to implement indigenous peoples' right to self-determination, whereas the new art 4 gives more force to the argument that the right to autonomy and self-government embraces the ways in which indigenous peoples' self-determination can be realised. See also ILA Interim Report, n. 16 above, at 11, where it states that the object and purpose of autonomy or self-government under art 4 is to enable indigenous peoples to "freely determine their political status and freely pursue their economic, social and cultural development", i.e., the right to self-determination as provided for by art 3.

<sup>29</sup> See Third Committee Approves Draft Resolution on Right to Development, UN General Assembly (Third Committee) Press Release (28 November 2006), available online: <<http://www.un.org/News/Press/docs/2006/gashc3878.doc.htm>>. As stated in the press release: "[B]ut an initiative led by Namibia, co-sponsored by a number of African countries, resulted in the draft being amended. In its new form, the draft would have the Assembly decide 'to defer consideration and action on the United Nations Declaration on the Rights of Indigenous Peoples to allow time for further consultations thereon' ... The amendments were adopted by a vote of 82 in favour to 67 against, with 25 abstentions (annex II) ... Prior to the vote, the representative of Peru — recalling that it had taken 24 years for the Declaration to be hammered out -- said the original draft had been revised to address the concerns of many delegations, particularly regarding the principle of self-determination of peoples and respect for national sovereignty... However, his counterpart from Namibia, explaining the proposed amendments, said that some provisions ran counter to the national constitutions of a number of African countries and that the Declaration was of such critical importance that it was only 'fair and reasonable' to defer its adoption by the Assembly to allow for more consultations".

<sup>30</sup> Other delegations also expressed their reservations. For instance Argentina and the Philippines insisted that the right to self-determination should be interpreted so as to be reconciled with territorial integrity, national unity or

The matter came up for a final decision in the 61st session of the General Assembly in September 2007 where the Declaration was adopted, with 143 States voting in favour, four against (New Zealand, Australia, the USA and Canada) and 11 abstaining (including Russia).<sup>31</sup> There were some important changes in the Declaration as compared to the version adopted by the Human Rights Council, most importantly with regard to the right to self-determination of indigenous peoples. The version adopted by the Human Rights Council left the door open for indigenous peoples to claim full-blown self-determination for the simple reason that Article 3 was still there, entitling them in principle to fully determine their political status. This was the crux of the matter, even though a good argument can be made that Articles 3 and 4 should have been interpreted together to mean that indigenous peoples were entitled to internal self-determination only, although Article 3 still left the door open for indigenous peoples to claim full self-determination. In order to make sure that there was no possibility to read too much into Article 3, the version ultimately adopted by the UN General Assembly made a crucial change in Article 46(1), which in the version adopted by the Human Rights Council read that “[N]othing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.” This was changed to make sure that indigenous peoples’ self-determination could mean at most internal self-determination:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging

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organizational structure of each State. See UN GAOR, 61<sup>st</sup> Sess., 107<sup>th</sup> Plenary Meeting, UN Doc. A/61/PV.107, 13 September 2007, para 19 and 108<sup>th</sup> Plenary Meeting, UN Doc. A/61/PV.108, 13 September 2007, para 5. Also see the ILA Interim Report, n. 19 above, at 9-10.

<sup>31</sup> For a general overview, see the information available online: <<http://www.iwgia.org/sw248.asp>>.

any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.<sup>32</sup>

UNDRIP is clearly a milestone development in the evolution of indigenous rights in international law.<sup>33</sup> The ILO 169 Convention has not received many ratifications (22 so far) so the 147 States that are now in favour of implementing the UNDRIP and its 46 provisions certainly constitute a backbone for indigenous rights. It needs to be remembered that these States have also committed to the preamble of the Declaration, which includes:

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples.<sup>34</sup>

It is also important to keep in mind that States have affirmed in Article 43 that “[T]he rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world”.<sup>35</sup>

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<sup>32</sup> UNDRIP, n. 3 above, art 46 (1).

<sup>33</sup>“Before UNDRIP, a number of issues afflicting indigenous peoples had been addressed through broad based universal human rights regimes ... and then ILO Convention No. 169 specifically codified indigenous peoples’ rights, yet a global comprehensive effort was missing.” S. Wiessner, “United Nations Declaration on the Rights of Indigenous Peoples, Introductory Note,” United Nations Audiovisual Library of International Law Historical Archives (2009), available online: <[http://legal.un.org/avl/ha/ga\\_61-/ga\\_61-295.html](http://legal.un.org/avl/ha/ga_61-/ga_61-295.html) 295AD>.

<sup>34</sup> UNDRIP, n. 3 above, preamble.

<sup>35</sup> Wiessner quotes J. Anaya: “UNDRIP constitutes an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law ... The principles and rights affirmed in the Declaration constitute or add to the normative frameworks for the activities of United Nations human rights institutions, mechanisms and specialized agencies as they relate to indigenous peoples.” Wiessner, n. 33 above.

## Legal status of UNDRIP

The UNDRIP is an UNGA resolution, and, as such, it is not legally binding. Even if some declarations, adopted as UNGA resolutions, such as the UN Declaration of Human Rights, are highly authoritative, as UNGA resolutions they remain legally non-binding. And yet, although non-mandatory as such, the UNDRIP may have the effect of codifying at least some customary international law rights of indigenous peoples.<sup>36</sup>

On 13 September 2007 the final version of UNDRIP was adopted by a clear vote of 143 in favour and four States against. The United States, Canada, Australia and New Zealand voted against it, while 11 – Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa and Ukraine – abstained from voting. Yet, after the vote, all of the four States that voted against the UNDRIP eventually endorsed it, even if some with reservations.

The International Law Association (ILA), a prominent non-governmental organization of international lawyers, examined the status of UNDRIP in customary international law.<sup>37</sup> The interim report concluded that perhaps the whole of UNDRIP could be seen to codify customary international law, simply

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<sup>36</sup> The ILA notes: “A general *opinio juris* and *consuetudo* exists within the international community according to which certain basic prerogatives that are essential in order to safeguard the identity and basic rights of indigenous peoples are today crystallized in the realm of customary international law.” ILA Interim Report, n.19 above, at 43-44. For scholarly interpretations, see S. James Anaya and Luis Rodríguez-Piñero, “The Making of the UNDRIP”, in UNDRIP Commentary n 3. above at 62.; Wiessner, n. 33 above; D. Sambo Dorough, “The Rights, Interests and Role of the Arctic Council Permanent Participants,” in eds. R. Beckman et al., *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States* (Brill Nijhoff, 2017), at 78; S. Wiessner and S. J. Anaya, “The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment” (2007), available online: <<https://www.jurist.org/commentary/2007/10/un-declaration-on-rights-of-indigenous-2/>>; S. Wiessner, “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis,” *Harvard Human Rights Journal* 12 (1999): 57; M. Davis, “To Bind or Not Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On,” *Australian International Law Journal* 19 (2012): 40-44. 0

<sup>37</sup> In January 2011 the position supported by the Committee in its Interim Report - ILA Interim Report n.19 above was favourably referred to by an ICSID Arbitral Tribunal, in the *Grande River Enterprises Six Nations, Ltd., et al. v United States of America*, 12 January 2011, available online: <<https://www.state.gov/documents/organization/156820.pdf>>. See also International Law Association, Sofia Conference (2012), Final Report, available online: <<http://www.ila-hq.org/index.php/committees>>.

because many human rights treaty monitoring bodies have started to use UNDRIP as a guide to interpret their respective human rights instruments that are legally binding on most States of the world.<sup>38</sup> As provided in the interim report:

Having ascertained the foregoing, it is opportune to make clear that it is not important to investigate whether the relevant rules of customary international law actually correspond, in their precise content, to the provision of UNDRIP in their actual formulation. By its own nature a declaration of principles, even when its content partially reproduces general international law, has in fact also a propulsive force, aimed at favouring further evolution of its subject matter for the future. What is really significant for the present enquiry is that the adoption of UNDRIP, after more than twenty years of negotiations, confirms that the international community has come to a consensus that indigenous peoples are a concern of international law, which translates into the existence of customary rules of binding force for all States irrespective of whether or not they have ratified the relevant treaties (which, on their part, taken together bind virtually all countries in the world). Therefore, it is today indisputable that ‘customary norms concerning indigenous peoples and their pull toward compliance’ are actually a reality in the context of the contemporary international legal order.<sup>39</sup>

The final report of the Committee (as well as Resolution No. 5/2012) notes that some of the provisions of the UNDRIP do evince customary international law. In its conclusions and recommendations, at paragraph 2, the final report (and the resolution) provide:

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<sup>38</sup> Id., ILA Interim Report at 51.

<sup>39</sup> Id.

The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a whole cannot yet be considered as a statement of existing customary international law. It, however, includes key provisions which correspond to existing State obligations under customary international law.<sup>40</sup>

Provisions recognising clear rights of indigenous peoples under customary international law are listed below:

The right of indigenous peoples to self-determination (paragraph 4); right to autonomy and self-government which translates into a number of prerogatives including participatory and consultation rights (paragraph 5); cultural rights and identity (paragraph 6); right to lands, territories and resources (paragraph 7); treaty rights (paragraph 9); reparation, redress and remedies (paragraph 10).<sup>41</sup>

With respect to these rights, the ILA had stated earlier in its interim report:

The rights are all strictly interrelated with each other in light of the holistic vision of life of indigenous peoples and consequently the relevant practice supporting the existence of customary law concerning each of the above

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<sup>40</sup> International Law Association, Sofia Conference (2012), Final Report, at 29, available online: <<http://www.ila-hq.org/index.php/committees>>. See also Resolution No. 5/2012 on the Rights of Indigenous Peoples. On the status of ILA Resolutions, Wiessner notes: "Generally, resolutions of the International Law Association, just as those of the International Law Commission, have been recognized as evidence of international law. The Third Restatement of Foreign Relations Law of the United States affirms this characterization. He also quotes Graf Vitzthum: global resolutions of a body as qualified and diverse as the International Law Association are stating a rare consensus amongst, at times, radically different cultures and value traditions, and thus should be especially appreciated and valued." See Siegfried Wiessner, "Culture and the Rights of Indigenous Peoples" in *The Cultural Dimension of Human Rights*, ed. Ana Vrdoljak (Oxford University Press, 2013) at 154-155; The American Law Institute, *Third Restatement of the Foreign Relations Law of the United States* (1987), § 103 Reporters' Notes No. 1.

<sup>41</sup> Id, ILA Sofia Conference (2012) Final Report and Resolution No.5/2012.



rights usually also serves the purpose of backing the assumption that the same status has been attained by any or all of the others.<sup>42</sup>

Also, the Report observes that several rights that are not yet custom are emerging as customary norms.<sup>43</sup> Irrespective of their legal status, most States with indigenous peoples in their territories have committed politically to realize their rights via the UNDRIP.

## **THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**

### **Development of the international law of the sea**

UNCLOS<sup>44</sup> has been characterized as “a comprehensive constitution for the oceans which will stand the test of time” and which “represents a monumental achievement of the international community, second only to the charter of the United Nations.”<sup>45</sup> These are not mere metaphors pushing towards hyperbole. UNCLOS has 168 State parties, although the US is still not a party. Importantly, the US has adopted the view that most of the substantive provisions of the Convention reflect customary international law.<sup>46</sup>

UNCLOS is one of the largest multilateral conventions in international law. Coastal States enjoy sovereignty over their internal waters and in the territorial

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<sup>42</sup> ILA Interim Report, n. 19 above.

<sup>43</sup> Id. Paragraph 3 of the Resolution.

<sup>44</sup> UNCLOS, n. 4 above.

<sup>45</sup> “A Constitution for the Oceans,” Remarks by T. B. Koh, President of the Third United Nations Conference on the Law of the Sea, in *The Law of the Sea: United Nations Convention on the Law of the Sea* (United Nations, 1983), at xxxiii.

<sup>46</sup> J. A. Roach, “Today’s Customary International Law of the Sea”, *Ocean Development and International Law* 45(3) (2014): 239.

sea and archipelagic waters, albeit with some constraints to respect international community rights, primarily navigational. The EEZ and continental shelf include sovereign resource rights and together with the contiguous zone also functional jurisdiction, that is specific legislative and enforcement jurisdictional powers. The regime for the high seas and the related freedoms is set out and is followed by regimes for particular geographical situations (islands, enclosed and semi-enclosed seas, access and transit rights for land-locked States), and the regime for the international seabed area and the new institutional and regulatory framework established for its administration. The convention also provides regimes for the protection and preservation of the marine environment (which is designed to operate in coordination with other environmental instruments), marine scientific research and marine technology development and transfer. Navigation rights are arguably the international community rights that have received the strongest possible level of protection in all ocean spaces under national jurisdiction and on the high seas. Other international community rights, such as fishing, laying of submarine cables and pipelines and marine scientific research are also protected. Finally, UNCLOS sets out a *smörgåsbord* of direct and third party facilitated dispute settlement procedures open to State Parties while also indicating what issues are subject to compulsory procedures.

## **The status of UNCLOS**

When considered against the long history of the international law of the sea since the 18<sup>th</sup> century and the extensive efforts at codification and progressive development in the 20<sup>th</sup> century, there is no doubt that UNCLOS enjoys high stature and status in international law. It is the result of a long historical timeline, trial and error, and adaptive learning. It was the outcome of an intense deliberative

process and with the clear intention to address all issues relating to the law of the sea, which are considered interrelated and need to be considered as a whole.<sup>47</sup>

Accordingly, UNCLOS is not to be tampered with lightly and indeed the instrument's own amendment procedures have not yet been used. However, it is not a static and closed instrument either. There have been instances where aspects of the Convention did not sufficiently or satisfactorily meet some contemporary or emergent issues, and accordingly formal initiatives were launched to explore possible change. These tended to be guided by compelling necessity and involved prolonged preparation and negotiation before adoption of a new instrument having the effect of supplementing, if not even amending the Convention. Guided by this spirit, the approach of international courts and tribunals called upon to interpret provisions of UNCLOS has largely been deferential and circumspect, while at the same time exploring interpretations and relationships to other instruments to assist resolution.<sup>48</sup>

UNCLOS anticipates a relationship to a broad range of international agreements by referring to other instruments using terminology as diverse as conventions,<sup>49</sup> special conventions,<sup>50</sup> treaty or treaties,<sup>51</sup> agreements,<sup>52</sup> special agreements<sup>53</sup> and arrangements or cooperative arrangements.<sup>54</sup> This diverse terminology was intended to capture a broad range of instruments and structures of international cooperation and not only to treaties as generally understood in

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<sup>47</sup> UNCLOS, n. 4 above, preamble.

<sup>48</sup> Tullio Treves, Procedural History of the United Nations Convention on the Law of the Sea, 10 December 1982, UN Audiovisual Library, available online at: <<http://legal.un.org/avl/ha/uncls/uncls.html>>.

<sup>49</sup> For example, UNCLOS, n. 4, arts 35(c), 108(1), 237(1), and Annex VI art 22.

<sup>50</sup> Id, art 237(2).

<sup>51</sup> For example, id, arts 92(1), 110(1), 116(a), 146 and Annex VI art 22.

<sup>52</sup> For example, id, arts 62(2), 151(1)(a), 151(1)(b), 151(1)(c), 151(3), 237(1), 269(b), 311(2), 311(3), 311(4), 311(5), and Annex VI art 21.

<sup>53</sup> Id, art 126.

<sup>54</sup> For example, id, arts 62(2), 62(4)(i), 66(5), 69(3), 69(5), 70(4), 70(6), 74(3), 83(3), 98(2), 151(1)(a), 151(1)(b), 151(1)(c), 151(3), 211(3) and 298(1)(a)(iii).

international law.<sup>55</sup> Also, several provisions of UNCLOS anticipate a relationship with other rules of international law,<sup>56</sup> general international law<sup>57</sup> and customary law.<sup>58</sup>

There are very few instances where UNCLOS expressly provides that its provisions do not apply when there is another treaty regime in place. The regime for straits used for international navigation is a case in point and its provisions do not affect “the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.”<sup>59</sup> There is further recognition that other rules of international law may apply in addition to the Convention.<sup>60</sup> Elsewhere with respect to its relationship to other agreements, the UNCLOS provides that its provision in this regard “does not affect international agreements expressly permitted or preserved by other articles of this Convention.”<sup>61</sup>

That UNCLOS addresses all issues relating to the law of the sea does not necessarily mean that the Convention applies exclusively, and indeed there may be instances where other instruments also apply. For example, with respect to the protection and preservation of the marine environment, Article 237 provides that

The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine

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<sup>55</sup> Treaty is defined as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Vienna Convention on the Law of Treaties, adopted 23 May 1969 (entered into force 27 January 1980), 1155 UNTS 331, art 2(1)(a).

<sup>56</sup> For example UNCLOS, n. 4 above, arts 2(3), 19(1), 21(1), 31, 58(2), 58(3), 87(1), 293(1), and 297(1)(b).

<sup>57</sup> Id, preamble.

<sup>58</sup> Id, art 221(1).

<sup>59</sup> Id, art 35(c).

<sup>60</sup> For example art 34(2), id, provides that “[T]he sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.”

<sup>61</sup> Id, art 311(5).

environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.<sup>62</sup>

In this case, however, the superiority of UNCLOS over these environmental agreements is clear. There is an accompanying duty for States to carry out their duties under their agreement in a manner consistent with UNCLOS.<sup>63</sup> In a similar vein but with respect to general agreements, Article 311(2) provides that

This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

The requirement of compatibility effectively establishes hierarchy of UNCLOS over other agreements.<sup>64</sup> There are also several provisions throughout UNCLOS which recognize the relevance or application of other rules of international law in so far as they are not incompatible with specific provisions of the Convention.<sup>65</sup>

Accordingly, UNCLOS acknowledges the existence of instruments that are complementary to it. A recent arbitral award considered this point with respect to Article 192 of UNCLOS, which provides that obligations in Part XII apply to all marine areas, and that there is a corpus of international environmental law that informs the provision.<sup>66</sup> The tribunal held that Article 192 created “the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to

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<sup>62</sup> Id, art 237(1).

<sup>63</sup> Id, art 237(2).

<sup>64</sup> *In the Matter of the South China Sea Arbitration (Republic of the Philippines v People’s Republic of China)*, PCA Case N° 2013-19, Award (12 July 2016) hereafter cited as *Philippines v China*).

<sup>65</sup> For example UNCLOS, n. 4 above, arts 58(3), 293(1) and 297(1)(b), and Annex III art 21.

<sup>66</sup> *Philippines v China*, n. 64 above, para 940.

degrade the marine environment,”<sup>67</sup> and that the Convention on the International Trade in Endangered Species was an instrument that provided pertinent obligations.<sup>68</sup>

A related issue is the relationship between UNCLOS and general international law. Despite the desire to settle all issues relating to the law of the sea, by its own admission UNCLOS did not manage to fully accomplish this task. This is underscored by the preamble which provides “that matters not regulated by this Convention continue to be governed by the rules and principles of general international law.”<sup>69</sup> The recent *Philippines v China* arbitral tribunal addressed the issue of historic fishing rights in foreign EEZs and concluded that the customary law on this subject was superseded by UNCLOS and that therefore such claims were not compatible with the Convention. In its ratio, the tribunal understood the scope of Article 311(2) to include general international law.<sup>70</sup>

Finally, UNCLOS State Parties may modify or suspend the application of specific provisions with respect to their relationship where this does not affect the Convention’s object and purpose or basic principles and the ability of other State Parties to enjoy their rights or perform their obligations.<sup>71</sup> In such cases there is a duty to notify other States.<sup>72</sup>

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<sup>67</sup> Id, para 941.

<sup>68</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, adopted 3 March 1973 (entered into force 1 July 1975), 993 UNTS 243 (hereafter cited as CITES). The Tribunal stated, “CITES forms part of the general corpus of international law that informs the content of Article 192 and 194(5) of UNCLOS. The conservation of the living resources of the sea is an element in the protection and preservation of the marine environment, and the general obligation to ‘protect and preserve the marine environment’ in Article 192 includes a due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection.” For identifying the species at risk, the Tribunal noted appendices I (species threatened with extinction and subject to the strictest level of international controls on trade) and II (species which may become threatened with extinction) of CITES. *Philippines v China*, n. 64 above, at paras 956-957.

<sup>69</sup> UNCLOS, n. 4 above, preamble.

<sup>70</sup> *Philippines v China*, n. 64 above, para 235.

<sup>71</sup> UNCLOS, n. 4 above, art 311(3).

<sup>72</sup> Id, art 311(4).

## EXPLORING THE INTERFACE BETWEEN UNDRIP AND UNCLOS

Having considered the historical context and legal status of UNDRIP and UNCLOS, we now explore the potential interface between the two. This analysis is undertaken in two steps, first to consider what might be the legal pathway(s) for UNDRIP (and the customary law it might incorporate) into the law of the sea, second what specific issues could potentially bring the two instruments into a relationship. We do not undertake an exhaustive examination to ascertain what provisions of UNDRIP have achieved customary law status, but rather rely on the observations made by the ILA and hypothesize what provisions in UNDRIP could potentially interface with provisions in UNCLOS.<sup>73</sup>

### Legal pathways

We argue that there are two potential legal pathways for UNDRIP to provide a supportive role for the law of the sea. A first argument is based on the continuing role of general international law with respect to aspects of the law of the sea that are not addressed by UNCLOS. As observed earlier, UNDRIP may reflect customary international law and if any of its provisions address a law of the sea matter not addressed by UNCLOS, it is arguable that the provisions concerned, *qua* custom, would govern the relations of States with respect to that matter. Naturally, one would need to ask the further question as to the likelihood that there are UNDRIP provisions that might qualify as law of the sea matters and which are not already addressed by UNCLOS.

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<sup>73</sup> The observations made by the ILA in the Interim Report 2010, Final Conference Report 2012, Resolution No. 5/2012, n.19 and 40 above.

The second argument is based on the interpretation of Article 192 provided by *Philippines v China*, where the tribunal held:

Article 192 of the Convention provides that “States have the obligation to protect and preserve the marine environment.” Although phrased in general terms, the Tribunal considers it well established that Article 192 does impose a duty on States Parties, the content of which is informed by the other provisions of Part XII and other applicable rules of international law. This “general obligation” extends both to “protection” of the marine environment from future damage and “preservation” in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment. The corpus of international law relating to the environment, which informs the content of the general obligation in Article 192, requires that States “ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.”<sup>74</sup>

The Convention on Biological Diversity, 1992 (CBD)<sup>75</sup> and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (CITES)<sup>76</sup> were considered as informing Article 192, as well as 194. With reference to CITES, the tribunal held that this instrument “is the subject of nearly universal adherence, including by the Philippines and China, and in the Tribunal’s view forms part of the general corpus of international law that informs the content of Article 192 and 194(5) of the Convention.”<sup>77</sup>

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<sup>74</sup> *Philippines v China*, n. 64 above, at para 941.

<sup>75</sup> CBD, n. 20 above.

<sup>76</sup> CITES, n. 68 above.

<sup>77</sup> *Philippines v China*, n. 64 above, at para 956.



The ‘corpus’ interpretation raises the interesting question as to what extent, if at all, the ‘environmental’ provisions of UNDRIP and the customary law they may reflect should be considered part of the corpus of law that informs Article 192. There is growing literature to support the contention that international human rights law contributes to the protection of the environment.<sup>78</sup> The argument could be extended to other parts of UNCLOS, such as Part III on marine scientific research, where provisions of UNDRIP and other international agreements, for example the CBD and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity, 2014,<sup>79</sup> which arguably have provisions that could inform the regime of consent in marine scientific research (MSR) under UNCLOS, as will be discussed below.

## Specific issues

We now proceed to identify specific issues for a more focused exploration of the potential interface between the two instruments.

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<sup>78</sup> For example, Principle 22 of the Rio Declaration on Environment and Development specifically notes the role of indigenous peoples: “[I]ndigenous people and their communities... have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.” See also Principles 10, 13, 17, and 23 of the Rio Declaration on Environment and Development, adopted 13 June 1992, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992). See also A. Boyle, “Human Rights and the Environment: Where Next,” *European Journal of International Law* 23, no. 3 (2012): 613–42; P. Sands, “Human Rights and the Environment,” Proceedings of a Geneva Environment Network roundtable, 2004; J. Harrington, “Climate Change, Human Rights, and the Right to Be Cold,” *Fordham Environmental Law Review* 18, no. 3 (2007) and the Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Submitted by Sheila Watt-Cloutier, with the support of the Inuit Circumpolar Conference, on behalf of All Inuit of the Arctic Regions of the United States and Canada) (7 December 2005), available online: <<http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionsummary.pdf>>.

<sup>79</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, adopted 29 October 2010 (entered into force 12 October 2014), Doc. UNEP/CBD/COP/DEC/X/1 (29 October 2010), art 8.b, available online: <[https://treaties.un.org/doc/source/docs/UNEP\\_CBD\\_COP\\_DEC\\_X\\_1-E.pdf](https://treaties.un.org/doc/source/docs/UNEP_CBD_COP_DEC_X_1-E.pdf)>.

## *Territorial, economic and resource issues*

UNDRIP sets out a series of territorial and resource use rights of indigenous peoples that potentially apply to ocean space. These include the right to engage freely in traditional and other economic activities<sup>80</sup> and to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources ...”.<sup>81</sup> Waters and coastal seas presumptively include ice-covered marine areas.<sup>82</sup> One of the most powerful rights is to “the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,”<sup>83</sup> which is accompanied by the further “right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”<sup>84</sup> The ILA notes in its Resolution No.5/2012 that States must protect the rights of indigenous peoples to their traditional lands, territories and resources.<sup>85</sup>

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<sup>80</sup> UNDRIP, n. 3 above, art 20. Article 20 protects the traditional activities or means of subsistence of indigenous peoples. It falls within the right to autonomy or self-government. See ILA Interim Report, n. 19 above, 14-15; Camilo Perez-Bustillo and Jessie Hohmann, “Indigenous Rights to Development, Socio-Economic Rights, and Rights for Groups with Vulnerabilities” in UNDRIP Commentary n.3 above at 482- 536. The ILA recognises indigenous peoples’ rights to autonomy or self-government as forming part of customary international law. See Resolution 5/2012 n.40 above, para 5.

<sup>81</sup> Id., UNDRIP, art 25. For more elaboration on “spiritual relationship” see Claire Charters, “Indigenous Peoples’ Rights to Lands, Territories and Resources in the UNDRIP” in UNDRIP Commentary id. at 409-410. The ILO 169 Convention has a similar provision but does not expressly include waters and territorial seas. It used the terms “collective aspects” and “total environment”. ILO 169 Convention, n. 15 above, art 13(1).

<sup>82</sup> The 2013 Alta Outcome Document of the World Conference on Indigenous Peoples contains specific references to ice, along with oceans and waters. For instance, its preamble notes, “[W]e Indigenous Peoples, have the right of self-determination and permanent sovereignty over our lands, territories, resources, air, ice, oceans and waters, mountains and forests” (emphasis added) and the reference is used throughout the document. Available online: <[http://www.un.org/esa/socdev/unpfii/documents/wc/AdoptedAlta\\_outcomedoc\\_EN.pdf](http://www.un.org/esa/socdev/unpfii/documents/wc/AdoptedAlta_outcomedoc_EN.pdf)>. See B. Baker, “Interlinkages in International Law: The Convention on Biological Diversity as a Model for Linking Territory, Environment, and Indigenous Rights in the Marine Arctic,” in Rebecca Pincus and Saleem H. Ali (eds), *Diplomacy on Ice: Energy and the Environment in the Arctic and Antarctic* (Yale University Press, 2015), 41, notes 83-84.

<sup>83</sup> UNDRIP, n. 3 above, art 26(1).

<sup>84</sup> Id, art 26(2).

<sup>85</sup> Resolution No. 5/2012, n.40 above.

ILO 169 contained similar provisions concerning rights to lands and resources.<sup>86</sup> In addition, States have substantive and procedural duties to provide legal protection to the lands, territories and resources while also being respectful of the laws, customs, traditions and land tenure systems of the indigenous peoples concerned.<sup>87</sup> These rights extend further to include determination and development of priorities and strategies for the lands, territories and resource development or use.<sup>88</sup> In this respect, States planning projects that impact on these rights have a procedural duty:

to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>89</sup>

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<sup>86</sup> ILO 169 Convention, n. 15 above, arts 14 and 15. The ILA notes that “[A]rticle 26(2) is confirmed in and reflects a vast range of developed jurisprudence, including that of the Inter-American Commission and IACHR, the ACHPR, the UN Human Rights Council, the HRC, the CERD, UN experts, UN Special Rapporteurs on indigenous peoples’ related issues, ILO adjudicatory bodies and domestic law. As such, the right can be reasonably considered as being part of customary international law as also evidenced by extensive state practice as well as *opinio juris*, especially in Latin America and the former Commonwealth colonies.” See ILA Interim Report, n. 19 above, at 22-23, notes 122-129. See especially the *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment (31 August 31 2001), Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001); *Mabo v Queensland (No 2)* (“*Mabo Case*”) [1992] HCA 23, (1992) 175 CLR 1 (3 June 1992); *The Wik Peoples v The State of Queensland & Ors*; *The Thayorre People v The State of Queensland & Ors* (“*Wik*”), HCA 40.

<sup>87</sup> UNDRIP, n. 3 above, arts 26(3) and 27. The ILA states that the state practice accompanying art 26(2) also supports the Article 26(3) State obligations. ILA Interim Report, n. 19 above.

<sup>88</sup> Id, art 32(1). “This alongwith art 32(2) is pivotal to enabling Indigenous peoples to set and pursue their own development path.” See Claire Charters n. above at 447.

<sup>89</sup> UNDRIP, n. 3 above, art 32(2). The ILA notes that this provision was contentious during the negotiations as it brings to fore some of the most pressing concerns for indigenous peoples, such as competing States’ and indigenous peoples’ claims to natural resources. As such, States’ consultation obligation was inserted and this implies consultation should be undertaken with the objective of obtaining indigenous peoples’ free, prior and informed consent, and in cases of large scale development projects with the potential to have a major impact on indigenous peoples’ territory, consent is necessary. See ILA Interim Report, n. 19 above, at 24-35; James Anaya, “Indigenous Peoples’ Participatory Rights in relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources” *Arizona Journal of International and Comparative Law* 22, no.1 (2011):7-17. This is also a key provision to address especially those cases where Indigenous customary law and national legislation differ as to the regime of these resources. Id, Claire Charters at 431.

This provision signifies substantial procedural duties.

While ‘waters’ and ‘coastal seas’ appear to be associated with a different right from the ownership right, the reference to territories might, in a law of the sea context, potentially include internal and territorial waters.<sup>90</sup> *Per se*, this does not appear to have any consequence for pertinent UNCLOS rules concerning the delineation of baselines and bay closing lines and the regime of the territorial sea. The UNDRIP rights described in this section essentially are domestic, that is falling under the framework of coastal State jurisdiction, and do not appear to produce external consequences.<sup>91</sup> The extent to which a coastal State recognizes and implements domestic indigenous rights in this respect is not governed by UNCLOS.

A separate question is whether indigenous resource rights could potentially be transboundary. There are precedents for the protection of traditional transboundary fishing rights.<sup>92</sup> Although UNCLOS makes no express reference to indigenous rights, in a provision on archipelagic waters, which are subject to the sovereignty of the archipelagic State, it establishes a duty on that State to

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<sup>90</sup> Claire Charters notes, “negotiators drafting the UNDRIP struggled to express semantically the relationships that Indigenous peoples have with their lands, territories and resources because Indigenous peoples often conceive of that relationship differently from non-Indigenous peoples.” Id, Claire Charters at 406. Dalee Sambo Dorough notes in the context of the Inuit, “[F]or the Inuit, a critical element is the need to recognise the profound relationship that they have with the Arctic Ocean coastal areas and their respective lands, territories and resources. In this context, the term ‘territories’ should be regarded as comprehensive and inclusive of the coastal land areas, shore fast sea ice, offshore areas of the ocean itself, including the seabed, which have been traditionally used for millennia as the source of sustenance in the way of whales, seals, walrus, migratory birds and other marine life.” Sambo Dorough, n. 36 above, at 80.

<sup>91</sup> Id., Sambo Dorough. As an example, the Labrador Inuit Land Claims Agreement in Canada affirms Inuit rights to the 12 nautical mile territorial sea, consistent with UNCLOS.

<sup>92</sup> See *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, XXII Reports of International Arbitral Awards 355–410 (Permanent Court of Arbitration 1999). The award recognized and protected traditional transboundary fishing rights of fishers from both sides. See also B. H. Oxman and W. M. Reisman, “Maritime Delimitation between Opposite States - Traditional ‘Artisanal’ Fishing Regimes - Transboundary Nonliving Resources - Interpretation of Prior Award - Straight Baselines - Effect of Coastal and Midsea Islands,” *American Journal of International Law* 94 (2000): 721–22.

recognize traditional fishing rights, but without prejudice to its sovereignty.<sup>93</sup> The term traditional could be interpreted to include traditional indigenous use. The Convention provides a framework for the definition and regulation of such rights.<sup>94</sup> This duty does not have a parallel in the territorial sea. There is no such reference to traditional fishing rights in the EEZ, although with respect to the coastal State's allocation of the surplus in the total allowable catch to other States, the Convention provides for the coastal State to take into account all relevant factors, "*inter alia* ... the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone ...".<sup>95</sup> It stands to logic and reason that '*inter alia*' be interpreted to include traditional indigenous fishing and habitual fishing to also include indigenous fishing that is long-established in the area. What is unclear is whether the coastal State, as a result of UNDRIP and the customary law it reflects, ought to provide preferential access to the surplus to indigenous fishers from a neighbouring State who have habitually fished in the area. In these cases, the coastal State retains the right to regulate fishing by foreign nationals.<sup>96</sup> The access to the surplus is a privilege, not a right. The *Philippines v China* arbitration considered the issue of historic fishing rights (although not specifically in the context of traditional indigenous fishing) in foreign EEZs and concluded that such rights were effectively extinguished by the regime of the EEZ.<sup>97</sup>

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<sup>93</sup> UNCLOS, n. 4 above, art 51(1). For a commentary on this provision, see S. N. Nandan and S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* vol II (Martinus Nijhoff, 2002), 447 *et seq.*

<sup>94</sup> "The terms and conditions for the exercise of such rights and activities, including the nature the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals." UNCLOS, n. 4, art 51(1).

<sup>95</sup> *Id.*, art 62(3). See *Philippines v China*, n. 64 above, para 242.

<sup>96</sup> *Id.*, art 62(4).

<sup>97</sup> "The Tribunal considers the text and context of the Convention to be clear in superseding any historic rights that a State may once have had in the areas that now form part of the exclusive economic zone and continental shelf of another State." *Philippines v China*, n. 64 above, para 247. The tribunal also noted *Qatar v Bahrain* on historic pearl fishing where the International Court of Justice held that it "seems in any event never to have led to the recognition of an exclusive quasi-territorial right to the fishing grounds themselves or to the superjacent

It is possible that indigenous rights under other instruments could potentially have a more direct relationship to UNCLOS provisions. These are outside the remit of this article and we refer to them only briefly. For example, under the CBD framework for *in situ* conservation,<sup>98</sup> State Parties have a duty to respect, preserve and maintain knowledge, innovations and practices of indigenous peoples and to encourage and develop methods of cooperation that include indigenous and traditional technologies in pursuance of the objectives of the CBD.<sup>99</sup>

### ***Mobility and communication issues***

UNCLOS does not directly address human mobility and communication issues, other than a brief reference to the jurisdiction for this purpose in the contiguous zone and navigation rights.<sup>100</sup> In recent years there has been a discernible growth of concern over immigrants and refugees using sea routes,<sup>101</sup> but this is not a concern in this article. Rather, an interesting issue which is not addressed by UNCLOS is the transboundary movement of people for kinship and traditional resource use reasons that are otherwise affected by maritime boundaries. The Convention's provisions on maritime boundary delimitation are couched in very general and issue-neutral terms, thus of no direct help on this matter. There are situations where indigenous people move across a maritime boundary for subsistence, spiritual, kinship and other communication purposes, as in the case of the transboundary North Water Polynya (*Pikialasorsuaq*) where the ice bridge

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waters." *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, ICJ Reports 2001, 40, para 236.

<sup>98</sup> CBD, n. 20 above, art 8(j).

<sup>99</sup> *Ibid*, art 18(4).

<sup>100</sup> UNCLOS, art 33(1).

<sup>101</sup> See "In Safety and Dignity: Addressing Large Movements of Refugees and Migrants," Report of the Secretary General (UN Doc. A/70/59, April 21, 2016, UN General Assembly, 70<sup>th</sup> session), also published in *International Journal of Refugee Law* vol. 28 (2016): 500-530. See Francesco Munari, "Migrations by Sea in the Mediterranean: An Improvement of EU Law is Urgently Needed," *Ocean Yearbook* 32: 118-158.

across the maritime boundary between Greenland and Ellesmere Island (Canada) is very important for the Inuit of Canada and Greenland (*Kalaallit Nunaat*) to maintain regular contact.<sup>102</sup>

International human rights instruments have addressed the issue of mobility in different ways. The Universal Declaration on Human Rights stated the principle as the right of everyone to “freedom of movement and residence within the borders of each State” and “the right to leave any country, including his own, and to return to his country.”<sup>103</sup> The ILO 169 Convention addressed mobility and communication and cooperation across borders in generic terms and provided that “Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.”<sup>104</sup> UNDRIP is more on point with respect to indigenous peoples “divided by international borders” who have “the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.”<sup>105</sup> States have a

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<sup>102</sup> See People of the Ice Bridge: The Future of Píkiálasorsuaq, Report of the Píkiálasorsuaq Commission, available online: <<http://pikialasorsuaq.org/en/Resources/Reports>>. See in particular Recommendation 3 on freedom to travel. The Commission found examples of bilateral agreements that support the recommendation to ease travel restrictions, such as: Treaty of Amity, Commerce and Navigation between His Britannick Majesty and the United States of America, London, 19 November 1794 (Jay Treaty), Parry vol 52 (1969), 243. This includes an objective addressing cultural connections; Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the Area Known as Torres Strait, and Related Matters, adopted 18 December 1978 (entered into force 15 February 1985), ATS 1985 No. 4 (hereafter cited as Torres Strait Treaty). This agreement protects traditional ways of life and livelihood of the traditional inhabitants of the islands and adjacent coastal areas of the Torres Strait. Some of its provisions worth noting are Article 10 that establishes a Protected Zone; Article 11 dealing with free movement and traditional activities including traditional fishing; and especially Article 12 that defines traditional customary rights in the following manner: “[W]here the traditional inhabitants of one Party enjoy traditional customary rights of access to and usage of areas of land, seabed, seas, estuaries and coastal tidal areas that are in or in the vicinity of the Protected Zone and that are under the jurisdiction of the other Party, and those rights are acknowledged by the traditional inhabitants living in or in proximity to those areas to be in accordance with local tradition, the other Party shall permit the continued exercise of those rights on conditions not less favourable than those applying to like rights of its own traditional inhabitants.”

<sup>103</sup> Universal Declaration, n. 6 above, art 13.

<sup>104</sup> ILO 169 Convention, n. 15 above, art 32.

<sup>105</sup> UNDRIP, n. 3 above, art 36(1).

corresponding duty “in consultation and cooperation with indigenous peoples, to take effective measures to facilitate the exercise and ensure the implementation of this right.”<sup>106</sup>

The ILA has discussed the right of indigenous peoples to maintain relations across borders in three contexts under UNDRIP: right to (cultural) self-determination, right to autonomy and self-government, and cultural rights and identity.<sup>107</sup> In its Resolution No. 5/2012, the ILA recognised all three rights as forming part of customary international law.<sup>108</sup> In light of this and the “widely accepted position” confirmed by the inclusion of the provision across international instruments, the ILA has urged States to facilitate contacts between indigenous peoples belonging to the same cultural community that are divided by international borders.<sup>109</sup>

In the event of a dispute between State Parties to UNCLOS with respect to mobility rights of indigenous peoples in transboundary ocean spaces, it is conceivable that an adjudicating body might turn to international human rights law for guidance and to find a rule to apply in this hypothetical scenario.<sup>110</sup> It is instructive to observe, although rare, the instances of human mobility in maritime

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<sup>106</sup> Id, art 36(2). The ILA lists examples of measures taken by States, either via changes in domestic law or through inter-State agreements at the bilateral and/or multilateral level, for instance the Nordic Saami Convention between Finland, Norway and Sweden. See ILA Interim Report n.19 at 15. See also Shin Imai and Kathryn Gunn, “Indigenous Belonging: Membership and Identity in the UNDRIP”, in UNDRIP Commentary n.3 above at 213-246 specially 238.

<sup>107</sup> ILA Interim Report, n. 19 above, at 10 and 15.

<sup>108</sup> Resolution No.5/2012 n.40 above, paras 4,5,6.

<sup>109</sup> Id. See also Imai and Gunn n.106 above.

<sup>110</sup> For instance, the Tribunal in *Philippines v China* noted “[W]here private rights are concerned, international law has long recognized that developments with respect to international boundaries and conceptions of sovereignty should, as much as possible, refrain from modifying individual rights.” It also quoted the *Abyei Arbitration Award*, that “traditional rights, in the absence of an explicit agreement to the contrary, have usually been deemed to remain unaffected by any territorial delimitation.” *Philippines v China*, n. 64 above, paras 798-799. See *Abyei Arbitration (Government of Sudan v Sudan People’s Liberation Movement/Army*, Final Award of 22 June 2009, XXX RIAA 145, at 412, para 766.



boundary agreements addressed in the form of transboundary arrangements, including for traditional inhabitants.<sup>111</sup>

### ***Protection and preservation of the marine environment***

In light of the special ties of Indigenous peoples to the environment, UNDRIP has a special provision, Article 29 of UNDRIP which establishes “[I]ndigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”<sup>112</sup> The obligation is further supported by secondary procedural duties.<sup>113</sup> In a similar vein, Article 7(4) of the ILO 169 Convention provides that “[G]overnments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.”<sup>114</sup> In this respect, the CBD is instructive as it sets out the framework for *in situ* conservation (also noted above) and maintains that State Parties have a duty to respect, preserve and

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<sup>111</sup> For example: Torres Strait Treaty, n. 109 above, preamble and arts 16 and 18 which addressed among other freedom of movement of traditional inhabitants; Agreement between India and Sri Lanka on the Boundary in Historic Waters between the Two Countries and Related Matters, 26-28 June 1974 (in force 8 July 1974), Limits in the Seas no 66 (US Office of the Geographer, 21 December 1975). The latter agreement concerned the historic waters of Palk Bay. Two articles are of direct interest:

Article 5

Subject to the foregoing, Indian fishermen and pilgrims will enjoy access to visit Kachchativu as hitherto, and will not be required by Sri Lanka to obtain travel documents or visas for these purposes.

Article 6

The vessels of India and Sri Lanka will enjoy in each other's waters such rights as they have traditionally enjoyed therein.

<sup>112</sup> While Article 29 specifically deals with protection of the environment and that of the productive capacity of their lands or territories or resources, an argument can be made that this ties with other rights, for example cultural rights. The ILA Interim Report mentions ‘ecocide’ as adverse, irreparable alterations to the environment that threaten the existence of entire populations under Article 7(2) dealing with genocide. See ILA Interim Report, n. 19 above, at 17. Also see Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, prepared by Mr. B. Whitaker, UN Doc. E/CN.4/Sub.2/1985/6, 2 July 1985, 17, para 33. This can be read (arguably) with art 194(5) of UNCLOS, n. 4 above, dealing with “measures taken to protect and preserve rare or fragile ecosystems”.

<sup>113</sup> These include assistance programmes for indigenous peoples for conservation and protection, ensuring no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent, and programmes for monitoring, maintaining and restoring the health of indigenous peoples. UNDRIP, n. 3 above, art 29.

<sup>114</sup> ILO 169 Convention, n 15 above.

maintain knowledge, innovations and practices of indigenous peoples<sup>115</sup> and to encourage and develop methods of cooperation that include indigenous and traditional technologies in pursuance of the objectives of the CBD.<sup>116</sup> In addition to giving effect to participatory and consultation mechanisms, this provision has been applied in conjunction with requirements of impact assessment in practice.<sup>117</sup> It is only logical to read Article 29 of UNDRIP along with Article 32(3) on States' obligations concerning impact assessment: "... appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact".<sup>118</sup> Further, the ILA notes, UNDRIP's provision on environmental protection (Article 29) should be read with general international environmental law.<sup>119</sup>

As observed earlier, Article 192 of UNCLOS establishes a fundamental obligation for State Parties "to protect and preserve the marine environment."<sup>120</sup> As the *Philippines v China* award concluded, this duty is further nourished by the larger corpus of international environmental law. The UNDRIP and ILO 169 Convention provisions, although within the context of international human rights law, provide specific rules for the protection, conservation and sustainable use of the environment in the interest of an identified group of beneficiaries.<sup>121</sup> This adds something to the more general duty in UNCLOS Article 192 and accordingly we argue that the environmental provisions contributed from international human

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<sup>115</sup> CBD, n. 20 above, art 8(j). For a discussion on traditional knowledge under the CBD and UNDRIP, see Tobias Stoll, "Intellectual Property and Technologies" in UNDRIP Commentary at 614.

<sup>116</sup> Id, art 18(4).

<sup>117</sup> See Stefania Errico, "Control over Natural Resources and Protection of the Environment of Indigenous Territories", in UNDRIP Commentary n.3 above at 425-460.

<sup>118</sup> Id at 453. Errico notes, "considerations related to the environmental impact of proposed activities in Indigenous territories and the consequent repercussions on the life, culture and livelihood of the concerned communities shall be part of the consultation and decision-making process required under the Declaration."

<sup>119</sup> See ILA Interim Report, n. 19 above, at 24.

<sup>120</sup> UNCLOS, n. 4 above, art 192.

<sup>121</sup> See n. 78 above. See also Agenda 21: Programme of Action for Sustainable Development, UN Doc. A/CONF.151/26 (Vol.II) adopted by the United Nations Conference on Environment and Development on 14 June 1992, available online: <<https://sustainabledevelopment.un.org/outcomedocuments/agenda21>>. See specifically Chapter 26, dedicated to "Recognizing and Strengthening the Role of Indigenous People and their communities".

rights law ought to be considered integral to the corpus of international environmental law that informs Article 192. This entails an active duty to protect and preserve the marine environment upon which the enjoyment of indigenous peoples' rights in international law depends.

### ***Marine scientific research***

UNDRIP establishes indigenous peoples' right "to maintain, control, protect and develop their ... traditional knowledge ..., as well as the manifestations of their sciences, technologies ..., including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora ...".<sup>122</sup> The right includes maintenance, control, protection and development of their intellectual property over traditional knowledge.<sup>123</sup> This falls under the cluster of indigenous peoples' cultural rights and identity.<sup>124</sup> The ILA, in its Resolution No. 5/2012, recognises these rights as forming part of customary international law.<sup>125</sup>

Accordingly, States have an obligation of conduct to take effective measures for the recognition and protection of the exercise of these indigenous

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<sup>122</sup> UNDRIP, n. 3 above, art 31(1). Stoll comments, "Article 31 introduces a holistic concept of Indigenous culture and knowledge.... In context with other provisions of the UNDRIP, it can be seen to reflect existing, or to promote the emergence of new rules of customary international law..." See Stoll at n.115 above for a commentary on Article 31 UNDRIP on intellectual property and technologies.

<sup>123</sup> Id.

<sup>124</sup> A related provision that focusses on intangible cultural heritage is art 13(1) which includes... "the right of indigenous peoples to develop and transmit their oral traditions....and to designate and retain their own names for communities, places ..." and it requires States to take effective measures to ensure protection of the right. Indigenous peoples indeed have their own place names and maps, for instance in the Canadian marine Arctic. See C. Aporta, "The Sea, the Land, the Coast, and the Winds: Understanding Inuit Sea Ice Use in Context," in I. Krupnik et al (eds), *SIKU: Knowing Our Ice -- Documenting Inuit Sea Ice Knowledge and Use* (Springer, 2010), 163–81. For more information on rights relating to culture under UNDRIP, see Alexandra Xanthaki, "Culture" in UNDRIP Commentary n.3 above at 273-298.

<sup>125</sup> See Resolution No.5/2012 n.40 above, paragraph 6. Earlier in the Interim Report, the ILA had noted: "the right to culture and its importance for the identity and development of individuals and communities is widely recognized by international treaties and jurisprudential or para-jurisprudential practice." See ILA Interim Report, n.19 above, at 19, notes 109-110. Also see Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted 16 December 1966 (entered into force 3 January 1976), A/RES/21/2200 and so on. On the scope of the "right to culture" see Xanthaki id. at 284-285.

rights.<sup>126</sup> Thus UNDRIP has introduced a further consideration in the regulation of scientific research and intellectual property products which potentially concern indigenous knowledge, science and technology in lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, and which may include marine spaces.

Against this backdrop, we argue that traditional knowledge is pertinent for the Marine Scientific Research (MSR) regime in UNCLOS.<sup>127</sup> MSR in the internal waters, archipelagic waters and territorial sea falls under the sovereignty of the coastal State and accordingly its regulation is a purely domestic prerogative.<sup>128</sup> Foreign research in such waters is a privilege, not a right. The regime of foreign MSR in the EEZ is substantially different and relies on the so-called ‘regime of consent’ set out in Part XIII of UNCLOS. The coastal State enjoys the exclusive rights to explore the living and non-living resources of the EEZ and the non-living resources and sedentary species of the continental shelf.<sup>129</sup> MSR which is not resource-related may be conducted by other State Parties and international organizations in accordance with the principles and regime established for this purpose in UNCLOS, including subjecting foreign MSR to coastal State consent and regulation.<sup>130</sup> Normally consent for MSR in the EEZ or on the continental shelf for the purpose to increase scientific knowledge of the marine environment and for peaceful purposes will be granted in accordance with coastal State rules and procedures,<sup>131</sup> which may include procedures for consultations with indigenous peoples affected. Generally, consent is not to be delayed or denied

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<sup>126</sup> Id, art 31(2).

<sup>127</sup> For instance, as the Arctic Marine Shipping Assessment suggests, for the preparation of traffic maps to avoid ‘user conflict’ over the same marine areas. See Arctic Marine Shipping Assessment at n.1 above, the chapter on Arctic marine infrastructure at 177.

<sup>128</sup> UNCLOS, n. 4 above, art 245. The Convention refers expressly only to the territorial sea, but given the legal status of internal and archipelagic waters implies exclusive authority to regulate MSR.

<sup>129</sup> Id, arts 56(1)(a) and 77.

<sup>130</sup> Id, art 246.

<sup>131</sup> Id, 246(3).

unreasonably.<sup>132</sup> We argue that a meaningful but lengthy engagement process to ensure free, prior and informed consent of indigenous peoples affected by a foreign MSR permit application is not unreasonable.<sup>133</sup> In the event a coastal State does not respond to an application for a permit or remains silent, the consent of the coastal State will be implied and the applicant State or international organization may proceed with MSR.<sup>134</sup>

An interesting question that arises is whether the free, prior and informed consent of indigenous peoples affected by a foreign MSR application has to be obtained as a legal duty. UNCLOS does not provide for exceptions. UNDRIP does not contain a provision expressly on point, but has two provisions that may be relevant. The first provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned ... in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”<sup>135</sup> Insofar, as a foreign MSR permit can be characterised as an administrative measure, it is captured by this duty. The second provision establishes that

States shall consult and cooperate in good faith with the indigenous peoples concerned ... in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>136</sup>

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<sup>132</sup> Id.

<sup>133</sup> In a Canadian case concerning an Inuit complaint regarding an MSR permit in Arctic waters granted to the German vessel *Polarstern*, it was argued successfully that the federal government failed to consult properly. See *Qikiqtani Inuit Association v Canada (Minister of Natural Resources)*, 2010 NUCJ 12; *Hamlet of Clyde River v TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 17. For the background and commentary on these cases, see T. Rodon, “Offshore Development and Inuit Rights in Inuit Nunangat”, in C. Pélaudeix and E.M. Basse (eds), *Governance of Arctic Offshore Oil and Gas*, (Routledge, 2017), 169-185.

<sup>134</sup> UNCLOS, n. 4 above, art 256.

<sup>135</sup> UNDRIP, n. 3 above, art 19. According to Anaya, “a generally accepted principle exists in international law that indigenous peoples be consulted with respect to any decision affecting them.” See J. Anaya at n.89 above.

<sup>136</sup> UNDRIP, n. 3 above, art 32(2).

This provision is sufficiently broad to capture MSR activities as “any project”, most especially if there are resource implications. Thus States have a related procedural duty.<sup>137</sup> Against this backdrop, and in a hypothetical scenario of proposed MSR that affects indigenous rights, the foreign MSR applicant ought to be aware of potential difficulties with the regime of implied consent, which may amount to no more than “constructive consent of the coastal State” and not necessarily backed by the “free, prior and informed consent” of indigenous peoples affected.<sup>138</sup> Free, prior and informed consent and broader participatory and consultation rights of indigenous peoples fall under the remit of the right to autonomy and self-government, recognised as a norm of customary international law by the ILA in its Resolution No.5/2012, and also widely reflected in the practice of UN treaty supervisory bodies and State practice.<sup>139</sup>

A related question is whether the coastal State may refuse to grant foreign MSR permission because of objections from indigenous peoples affected by the proposed research. UNCLOS provides four bases for coastal States to withhold consent, namely if the project

- (a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;
- (b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;

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<sup>137</sup> “States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.” Id, art 32(3). According to the ILA, this would involve some form of recompense or profit-sharing for indigenous peoples, for instance through impact and benefit agreements. See ILA Interim Report, n. 19 above, 43.

<sup>138</sup> On FPIC, see Mauro Barelli, “Free, Prior and Informed Consent” in UNDRIP Commentary n.3 above at 268. “FPIC may have significantly different implications depending on the way in which it is read and understood”.

<sup>139</sup> See arts 6 and 7 of ILO Convention No. 169, n. 15 above. The UN Committee on the Elimination of Racial Discrimination called upon States to “[E]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.” CERD General Recommendation 23 on Indigenous Peoples, adopted 18 August 1997, para 4(d), available online: < <http://hrlibrary.umn.edu/gencomm/genrexxiii.htm>>.

- (c) involves the construction, operation or use of artificial islands, installations and structures referred to in articles 60 and 80;
- (d) contains information communicated pursuant to article 248 regarding the nature and objectives of the project which is inaccurate or if the researching State or competent international organization has outstanding obligations to the coastal State from a prior research project.<sup>140</sup>

Unless the research is of direct significance to resources or is potentially harmful to the environment, this text is fairly limited in providing bases for objecting on account of adverse impacts on indigenous peoples' rights.

A provision that could assist coastal States' implementation of participatory rights for their indigenous peoples with respect to MSR in the EEZ or on the continental shelf is Article 249(1), which concerns the duty of foreign MSR operators to comply with certain conditions such as the coastal State's right to participate or be represented in the MSR project. The coastal State could use this provision to introduce conditions for the MSR permit to ensure participation by representatives of indigenous peoples and organizations. Participation could include presence on board research vessels and receipt of research reports and results.

UNDRIP, *qua* custom, could play a role in amplifying the regime of MSR and possibly also as informing good research ethics practices. From an UNDRIP perspective, the coastal State has a duty to act in the interests of indigenous peoples and not remain silent. And from an UNCLOS perspective, the coastal State also has a good faith duty towards MSR applicants and must not abuse its right to regulate such research.<sup>141</sup>

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<sup>140</sup> UNCLOS, n. 4, art 246(5).

<sup>141</sup> *Id.*, art 300.

## *Military activities*

While UNCLOS establishes a legal order that promotes peaceful uses of the oceans,<sup>142</sup> military uses are a fact. Generally, warships enjoy international navigation rights and immunities from jurisdiction.<sup>143</sup>

Article 30 of UNDRIP contains an innovative provision protecting indigenous rights from military activities by providing that such activities “shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned,”<sup>144</sup> and accompanied by a procedural duty to conduct effective consultations.<sup>145</sup> It is interesting to observe that this provision does not appear to limit such activities to domestic military activities. Under UNCLOS, the coastal State is able to extend protection to indigenous uses of the territorial sea and archipelagic waters through the regime of innocent passage and by using its power to regulate passage.<sup>146</sup> It is in the position to impose express restrictions on military activities which violate the rules governing innocent passage.<sup>147</sup> Under UNDRIP, States “shall take the appropriate measures,

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<sup>142</sup> Id, preamble and arts 88 and 301.

<sup>143</sup> Id, arts 32 and 95.

<sup>144</sup> UNDRIP, n.3 above, art 30. “UNDRIP is the first instrument on indigenous peoples’ rights which devotes a specific Article on military activities in indigenous peoples’ lands and territories...It tries to strike a balance between State security and public order issues on the one hand and indigenous peoples’ rights and interests on the other... As a general principle, it prohibits military activities in indigenous peoples’ territories but contemplates three exceptions... All the exceptions provided in Article 30 are conditional upon the realization of prior consultations..” Stefania Errico n.117 above at 454-455.

<sup>145</sup> Id, UNDRIP art 30. The ILA envisions this provision to fall under indigenous peoples’ land rights. See ILA Interim Report, n. 19 above at 24, note 133. ILA Resolution No. 5/2012 recognizes land rights as forming part of customary international law. See ILA Resolution No.5/2012 n.40 above, para 7.

<sup>146</sup> See UNCLOS Articles 22 and 53.

<sup>147</sup> Id. For example, UNCLOS, id, art 19 which defines innocent passage as navigation which is not prejudicial to the peace, good order and security of the coastal State, and accordingly certainly activities are considered prejudicial, such as threat or use of force, exercises or practice with weapons, collecting information prejudicial to the defense of the coastal State, launching, landing or taking on board aircraft or military devices and interfering with communications systems. Under art 30 the coastal State may require a foreign warship that does not comply with the laws and regulations concerning passage to leave the territorial sea immediately.



including legislative measures, to achieve the ends of this Declaration.”<sup>148</sup> The ILA notes that complaints to international courts (and mechanisms set-up for the purpose) regarding use of indigenous peoples’ lands and territories for military activities have been resolved in favour of indigenous peoples’ rights.<sup>149</sup>

The extent to which protection can be extended to indigenous uses in the EEZ, where they exist, is less clear. Where they exist in the EEZ, one would need to overcome the difficulty of characterising areas of the EEZ as ‘lands’ and ‘territories’. Further, the EEZ is subject to particular freedoms of the high seas, including navigation.<sup>150</sup> There is controversy as to whether all military activities, as distinct from mere navigation by warships, can be considered ‘internationally lawful uses’ related to the freedom of navigation of the high seas.<sup>151</sup> One observer suggests that the UNCLOS may not have the final word on this matter given that there is a growing practice of coastal States that require consent.<sup>152</sup> It is pertinent to observe that UNCLOS has introduced a duty on States in the EEZ to pay “due regard to the rights and duties of the coastal State” and to “comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.”<sup>153</sup> Where indigenous lands and territories can be demonstrated to include areas of the EEZ, it is conceivable that the coastal State’s sovereign resource rights and jurisdiction for MSR and environment protection

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<sup>148</sup> UNDRIP, n. 3 above, art 38. Article 38 is applied on a case-by-case basis, in a variety of contexts. See Willem van Genugten and Federico Lenzerini, “Legal Implementation and International Cooperation and Assistance: Articles 37-42” in UNDRIP Commentary at 539-572.

<sup>149</sup> Under UN Treaty bodies and the Inter-American human rights system. See ILA Interim Report, n. 19 above, 24, note 133.

<sup>150</sup> UNCLOS, n. 2, art 58(1).

<sup>151</sup> Nandan and Rosenne, n. 95 above, 564; see also Proelss’ comments in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck, 2017), 453.

<sup>152</sup> “It seems doubtful, however, that the limited approach taken by the Convention on the issue of military activities can be regarded as the final word, taking into account the growing body of State practice requiring prior consent for the performance of naval military exercises. In light of this, it may simply be impossible today to come to a conclusive answer on whether military activities reaching beyond mere passage or overflight are covered by Art, 58(1).” Proelss, id, at 453.

<sup>153</sup> UNCLOS, n. 4 above, art 58(3).

could provide a basis for the protection of indigenous interests, on the basis of other rules of international law' (i.e., UNDRIP *qua* custom), and to expect compliance on the basis of the due regard duty.<sup>154</sup>

### ***Technical assistance and capacity-building***

UNDRIP provides for the capacity-building of indigenous peoples to enable them to enjoy their rights by providing a right to access financial and technical assistance.<sup>155</sup> UN organizations and intergovernmental organizations are singled out to mobilize financial cooperation and technical assistance, as well as “[W]ays and means of ensuring participation of indigenous peoples on issues affecting them shall be established.”<sup>156</sup> The ILA has noted an entire category of rights of indigenous peoples to development and international cooperation.<sup>157</sup>

The UNCLOS provisions on technical assistance are primarily concerned with aiding developing States with respect to MSR, marine technology cooperation (including with respect to activities in the international seabed area).<sup>158</sup> On face value, these provisions do not appear to interface with UNDRIP. What is of more significance is the UNDRIP expectation that indigenous peoples be provided with assistance by international organizations to enjoy their rights and the expectation of these organizations, including those that are designated

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<sup>154</sup> On the due regard duty see Julia Gaunce, “On the Interpretation of the General Duty of ‘Due Regard’”, *Ocean Yearbook* 32, no.1 (2018): 27-59.

<sup>155</sup> UNDRIP, n. 1, art 39. For a scholarly interpretation, see Willem van Genugten and Federico Lenzerini, n.148 above.

<sup>156</sup> *Id.*, UNDRIP art 41.

<sup>157</sup> ILA Interim Report, n. 19 above, 36-38. “The ‘right to development’ can be conceived according to a twofold perspective. First, a substantive right to development based on self-determination and/or active and equal participation embodied in Article 23 (indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development); second, a procedural right to development under Article 39 aimed at facilitating the implementation of the other rights enshrined in the Declaration. Owing to the complexity of development processes, the State alone cannot establish the ideal environment for the full realisation of human rights. This is a task that requires cooperation from the entire international community, particularly international institutions.” See also Genugten and Lenzerini, *id.*

<sup>158</sup> In UNCLOS, n. 4 above, Parts XIII and XIV. See especially arts 202, 203, 266, 269, 274 and 275.

‘competent international organizations’ by UNCLOS, to ensure their participation on issues that affect them. For example, in recent years the IMO, as the organization in UNCLOS responsible for international shipping, has deliberated on several issues potentially affecting indigenous peoples, such as the development of the Polar Code, and yet there is no evidence that efforts were exerted to involve indigenous peoples of the Arctic, which happen to have organizations that represent them.<sup>159</sup> In calling for the promotion of inclusive participation of indigenous peoples, UNDRIP speaks directly to international organizations and does not rely on States only to represent the interests of indigenous peoples.

### *Good faith*

In implementing UNDRIP, States are expected to “consult and cooperate in good faith” and to obtain the “free, prior and informed consent” of indigenous peoples in legislating and administration.<sup>160</sup> Indigenous peoples have “the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.”<sup>161</sup> The ILA notes that “the enforcement of this right is inextricably linked to the various provisions of UNDRIP that guarantee access to

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<sup>159</sup> There are six federations of indigenous organizations that enjoy the status of Permanent Participants in the Arctic Council, namely: Aleut International Association (AIA); Arctic Athabaskan Council (AAC); Gwich'in Council International (GCI); Inuit Circumpolar Council (ICC); Russian Association of Indigenous Peoples of the North (RAIPON); and Saami Council (SC). See Sambo Dorough, n. 36 above. The remarks of IMO's Secretary General at a recently concluded conference on the Implementation of the Polar Code are on point: “I am convinced about listening to the voice of indigenous peoples. Increased maritime activity has an obvious potential impact on Arctic indigenous peoples and communities who depend on the marine environment for food ... hunting, fishing and other traditional ways are central to the survival of their culture.”- Keynote address by the IMO's Secretary General, Mr Kitack Lim, International Conference on Harmonized Implementation of the Polar Code, organised by the Finnish Transport Safety Agency, more information available online: <<https://www.trafi.fi/en/polarcode1year>>.

<sup>160</sup> UNDRIP, n. 3, art 19. Article 19, as noted above, falls under indigenous peoples' right to autonomy and self-government.

<sup>161</sup> Id, art 37.

just and fair redress or resolution of conflicts and disputes.”<sup>162</sup> In its Resolution No.5/2012, the ILA recognises both treaty rights as well as the rights of indigenous peoples to reparation and redress as forming part of customary international law.<sup>163</sup> Further, UNDRIP “shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.”<sup>164</sup> These provisions should inform the coastal State’s exercise of rights and performance of obligations in UNCLOS which have a bearing on indigenous rights.

UNCLOS provides for State Parties to fulfil their obligations in good faith and to exercise their rights and freedoms in a manner that does not amount to an abuse of right.<sup>165</sup> It is arguable that, as between State Parties, these intertwined duties which encumber the exercise of rights and performance of duties throughout the Convention apply to the areas of potential interface between UNDRIP and UNCLOS.

### *Dispute settlement*

The ILA, in its Resolution No.5/2012 and the Interim Report, describes the customary international law status of the right of indigenous peoples to reparation and redress for the wrongs suffered<sup>166</sup> and in the following words: “[I]ndigenous peoples have recourse to domestic courts and States have a duty to ensure access to just and fair procedures and remedies for the resolution of conflicts, taking into consideration “the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.”<sup>167</sup>

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<sup>162</sup> ILA Interim Report, n.19 above, 52.

<sup>163</sup> See ILA Resolution No.5/2012 n.40 above, paras 9 and 10.

<sup>164</sup> UNDRIP, n. 3 above, art 46.

<sup>165</sup> UNCLOS, n. 4 above, art 300.

<sup>166</sup> See ILA Interim Report, n. 19 above, at 40-43, 53.

<sup>167</sup> UNDRIP, n. 1 above, art 40.

UNDRIP does not address the situation of a dispute between States concerning the existence, interpretation and application of indigenous rights. It is conceivable that such disputes could arise in the law of the sea, perhaps in similar scenarios to maritime boundary cases where traditional or historic fishing rights were at issue.<sup>168</sup> Where issues of interpretation and application of provisions of UNCLOS relate to indigenous rights, and there is disagreement among interested State Parties, the Convention provides options for dispute settlement. Naturally, such disputes would have to arise under the right factual matrix, such as, for example, the exercise of indigenous rights supported by the host State that affect the interests of another State Party, or possibly a coastal State excusing its conduct which appears inconsistent with provisions of the Convention, but on account of its efforts to protect indigenous rights. Such a situation could arise with respect to an allegation by a researching State that with respect to a specific MSR project the coastal State is not exercising its rights in a manner compatible with the Convention.<sup>169</sup> Our purpose here is not to identify all possible dispute scenarios, but rather to consider what the options for dispute settlement might be from a theoretical perspective.

In Part XV UNCLOS provides a comprehensive system for the settlement of disputes concerning the interpretation or application of the Convention. State Parties can choose any peaceful means of their choice. They have a range of third party-assisted options to choose from, where direct bilateral diplomacy fails to resolve the dispute, such as conciliation, adjudication under the International Court of Justice (ICJ) or International Tribunal for the Law of the Sea (ITLOS),

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<sup>168</sup> On historic fishing rights, see *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, Judgment ICJ Reports 18 (1982); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Merits ICJ Reports 40 (2001); *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, XXII Reports of International Arbitral Awards.

<sup>169</sup> UNCLOS, n. 4, art 297(2)(b).

and arbitration under annexes VII and VIII of UNCLOS, or even outside the framework of the Convention, for example under the auspices of the Permanent Court of Arbitration or other *ad hoc* arbitration process. State Parties may express their preference on ratification or accession or at any time thereafter.<sup>170</sup> The system operates on the basis of compulsory and optional procedures. Pending resolution of a dispute, provisional measures may be adopted by a court or tribunal.<sup>171</sup> A provision under another treaty or convention in force between the disputants, such as ILO 169 may also be considered and UNCLOS empowers the ITLOS to entertain such cases.<sup>172</sup>

It is possible that a dispute that concerns indigenous rights could be subject to the compulsory procedures or may be subject to any of the listed limitations and exceptions. For example, a dispute concerning the MSR procedures are subject to the compulsory procedures, except that the coastal State is not obliged to submit to the procedure when the dispute concerns the exercise of its right or discretion in accordance with the regulatory framework in Article 246 or where the dispute concerns its decision to suspend or cease an MSR project under Article 253, such as where there is non-compliance with the permitting terms.<sup>173</sup> In the event of disputes under these two provisions, there is compulsory conciliation in accordance with Annex V, except that the conciliation cannot question the exercise of the coastal State's discretion under the two provisions.<sup>174</sup> This is interesting from an UNDRIP perspective because it provides the coastal State with substantial leeway in setting permitting terms or withdrawing MSR permits when indigenous rights may be affected. There are similar qualifications

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<sup>170</sup> Id, art 287.

<sup>171</sup> Id, art 290.

<sup>172</sup> Id., annex VI art 22.

<sup>173</sup> Id., art 297(2)(a).

<sup>174</sup> Id, art 297(2)(b).

for fisheries disputes, protection of particular coastal State rights and possible resort to conciliation.<sup>175</sup>

It is conceivable that the maritime boundary dispute may concern in part the weight to be given to indigenous uses of the area in dispute. In the past, there have been maritime boundary disputes that were resolved while recognizing transboundary resource use rights.<sup>176</sup> In another class of disputes in Part XV, concerning maritime boundary delimitation (as well historic titles and historic bay disputes), a State Party may exempt such disputes from compulsory settlement if it expresses such an intention on becoming a party or at any time thereafter.<sup>177</sup> In such cases, a compulsory conciliation procedure remains applicable and the disputants are expected to negotiate an agreement based on the commission's report. A recent conciliation procedure was successful in assisting States in resolving their maritime boundary dispute.<sup>178</sup> If no agreement is reached, they may still resort to a third-party procedure of their choice, but naturally only if they agree. A final class of disputes that a State may opt to exempt from the dispute settlement procedures would be those concerning military activities and law enforcement.<sup>179</sup> Clearly, in the latter case a dispute concerning the impact of military activities on indigenous rights may be excluded, if the State conducting military activities chooses to do so.

It is possible there may be conflicts between a coastal State and another State concerning a matter in the EEZ over which UNCLOS has not attributed rights or

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<sup>175</sup> Id, art 297(3).

<sup>176</sup> For example *Eritrea v Yemen*, n. 100 above and Torres Strait Treaty, n. 109 above. See S. M. Weldehaimanot and D. R. Mekonnen, "Favourable Awards to Transboundary Indigenous Peoples", *Australian Indigenous Law Review* 16, no.1 (2012): 60-76.

<sup>177</sup> UNCLOS, n. 4 above, art 298(a).

<sup>178</sup> Australia and Timor-Leste recently concluded a successful conciliation process under Annex V of UNCLOS. See Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia, Permanent Court of Arbitration Press Release (9 May 2018), available online: <<https://pcacases.com/web/sendAttach/2358>>.

<sup>179</sup> UNCLOS, n. 4 above, art 298(b).

jurisdiction to a State. A hypothetical example concerns transboundary movement of indigenous peoples through territorial seas and EEZs, as in the case of the Arctic. In such instances, the Convention provides for such conflicts to be resolved “on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole”.<sup>180</sup> This provision appears to open the possibility to consider indigenous practices and rights under UNDRIP as constituting relevant circumstances to be given weight in reaching an equitable solution.

Once a case is admitted, the applicable law to a dispute under UNCLOS includes, in addition to the Convention itself, other rules of international law not incompatible with it,<sup>181</sup> which arguably could include the general international law concerning indigenous rights.<sup>182</sup> The power of an international court or tribunal to decide a case *ex aequo et bono* is also potentially relevant.<sup>183</sup> Procedurally, *amicus curiae* briefs on behalf of indigenous peoples may be a good device not only for their participation (especially since they are not a ‘party’ to a dispute while it might still affect their interests), but for the tribunal to take all relevant dimensions of the dispute into account.<sup>184</sup>

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<sup>180</sup> Id, art 59. See also n.154 above.

<sup>181</sup> Id, art 293(1). Article 311 as mentioned in n. 72 above deals with compatibility of UNCLOS with ‘other agreements’.

<sup>182</sup> As an analogy, Christina Binder’s comments on UNDRIP as applicable law in the context of international investment disputes are worth considering: “....Typical choice-of-law clauses in investment treaties refer to the law of the host country and such rules of international law as are applicable. Tribunals could thus draw upon relevant instruments for the protection of Indigenous rights as part of the applicable international law of treaties (eg. ILO Convention 169) or as applicable customary international law. Especially for the latter, the UNDRIP’s codification of relevant rights seems important. In a similar vein, tribunals could also apply Indigenous rights as part of the law of the host State.” See n.14 above. In an UNCLOS context, law of the host State could be replaced by law of the coastal State.

<sup>183</sup> Id, art 293(2). See also Statute of the International Court of Justice, adopted 26 June 1945 (entered into force 24 October 1945), 3 Bevens 1179, art 38(2).

<sup>184</sup> Adopted and modified from Binder’s suggestion on *Amicus curiae* participation in investment proceedings. See Binder n.14 above at 104.



## CONCLUSION

In this reflective article we raised the question whether there is a relationship between UNDRIP and UNCLOS where provisions of the two instruments potentially overlap or interact on specific subject-matter. We argued there is a potential relationship.

We recognize that the two instruments have different levels of authoritativeness, that UNCLOS is a major multilateral convention, whereas UNDRIP is an UNGA resolution which *per se* is not legally binding. We further observed that to the extent UNDRIP's provisions reflect customary international law, the customary norms they may codify potentially produce legal consequences for the overlapping subject-matter in UNCLOS. Although we discuss specific UNDRIP provisions in some depth and draw on authoritative opinion concerning their status, we refrained from concluding on their precise legal status. Such an assessment would require a lengthier and more in-depth study. Rather, we hypothesized that assuming the UNDRIP provisions concerned are considered to reflect customary norms, there is arguably interesting potential relationships to particular provisions of UNCLOS, naturally in the right factual matrix where ocean uses intertwine with indigenous rights.

We see two potential roles for UNDRIP in the law of the sea. The first is a potential supplementary role for such customary norms through the preambular pathway that matters not regulated by UNCLOS continue to be governed by the rules and principles of general international law. The second is a further potential interpretative role for UNDRIP customary norms in contributing to the corpus of international environmental law that informs the interpretation of the general duty of States to protect and preserve the marine environment.

At this stage and as we noted at the outset, our enquiry is preliminary and exploratory of specific issues, but we would expect that as long as our premises hold, there are possibly other rights and duties in the Convention whose interpretation in the contemporary international law context could benefit from consideration of UNDRIP provisions. Through this reflective piece we hope to inspire additional paths of enquiry and research, such as case studies of actual and emerging practices, comparative consideration of domestic legislation and court decisions.